

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

HARRY BURDICK,

Plaintiff(s),

vs.

STATE OF NEVADA DEPARTMENT
CORRECTION, et al.,

Defendant(s).

Case No. 2:15-cv-01131-JCM-NJK

REPORT AND RECOMMENDATION

(Docket No. 8)

Pending before the Court is Plaintiff's Amended Complaint. Docket No. 8. The Court has granted Plaintiff leave to proceed *in forma pauperis*. Docket No. 6. After granting his request to proceed *in forma pauperis*, the Court must screen Plaintiff's complaint pursuant to 28 U.S.C. § 1915. Upon screening Plaintiff's Complaint, the Court found Plaintiff failed to state a viable claim, and granted him leave to amend his Complaint. Docket No. 6. Plaintiff has now filed an amended complaint. Docket No. 8.

Federal courts are given the authority to dismiss a case if the action is legally "frivolous or malicious," fails to state a claim upon which relief may be granted, or seeks monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2). When a court dismisses a complaint under § 1915, the plaintiff should be given leave to amend the complaint with directions as to curing its deficiencies, unless it is clear from the face of the complaint that the deficiencies could not be cured by amendment. *See Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides for dismissal of a complaint for failure to state a claim upon which relief can be granted. Review under Rule 12(b)(6) is essentially a ruling

1 on a question of law. *See Chappel v. Laboratory Corp. of America*, 232 F.3d 719, 723 (9th Cir. 2000).
2 A properly pled complaint must provide a short and plain statement of the claim showing that the pleader
3 is entitled to relief. Fed.R.Civ.P. 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).
4 Although Rule 8 does not require detailed factual allegations, it demands “more than labels and
5 conclusions” or a “formulaic recitation of the elements of a cause of action.” *Ashcroft v. Iqbal*, 556 U.S.
6 662, 678 (2009) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). The court must accept as true all
7 well-pled factual allegations contained in the complaint, but the same requirement does not apply to legal
8 conclusions. *Iqbal*, 556 U.S. at 679. Mere recitals of the elements of a cause of action, supported only by
9 conclusory allegations, do not suffice. *Id.* at 678. Second, where the claims in the complaint have not
10 crossed the line from conceivable to plausible, the complaint should be dismissed. *Twombly*, 550 U.S. at
11 570. Allegations of a *pro se* complaint are held to less stringent standards than formal pleading drafted by
12 lawyers. *Hebbe v. Pliler*, 627 F.3d 338, 342 & n.7 (9th Cir. 2010) (finding that liberal construction of *pro*
13 *se* pleadings is required after *Twombly* and *Iqbal*).

14 Given Plaintiff’s status as a *pro se* litigant, the Court has construed his complaint liberally. Plaintiff
15 attempts to assert claims pursuant to 42 U.S.C. § 1983. Docket No. 8 at 1. To state a claim under § 1983,
16 Plaintiff must allege that a right secured by the Constitution or statutory law has been violated, and the
17 deprivation was committed by a person acting under color of law. *See Anderson v. Warner*, 451 F.3d 1063,
18 1067 (9th Cir. 2006).

19 Plaintiff alleges that, while he was incarcerated, he expressed his desire to transfer to California
20 after his Nevada sentence expired. Docket No. 8 at 2. Plaintiff further alleges that Defendant Zenner, a
21 sergeant at Clark County Parole and Probation, told Plaintiff he would provide Plaintiff and his brother bus
22 tickets to California. *Id.* at 2-3. Plaintiff alleges that, despite the expiration of his Nevada sentence, the
23 parole board denied him parole in May 2014. *Id.* at 3. Plaintiff therefore asserts claims against Defendant
24 Zenner in both his official and individual capacities. *Id.* at 2.


25 In federal court, the Eleventh Amendment of the United States Constitution bars claims against state
26 officials in their official capacity. *Pena v. Gardner*, 976 F.2d 469, 472 (9th Cir. 1992) (citing *Hafer v.*
27 *Melo*, 502 U.S. 21 (1991)). Accordingly, Plaintiff’s claim against Defendant, a state official, arising out
28 of his official conduct must be dismissed.

Parole board members are entitled to absolute immunity for parole board decisions. *Brown v. California Dep't of Corr.*, 554 F.3d 747, 751 (9th Cir. 2009). Absolute immunity has been extended to parole officials for "actions integral to those decisions." *Swift v. California*, 384 F.3d 1184, 1191 (9th Cir. 2004). Similarly, parole officials enjoy absolute immunity for carrying out facially valid orders from the parole board. *Chavez v. City of Petaluma*, 2015 WL 3766460, *11 (N.D. Cal. June 16, 2015) (extending *Engbretson v. Mahoney*, 724 F.3d 1034, 1035 (9th Cir. 2013), which held that prison officials enjoy absolute immunity from liability under 42 U.S.C. § 1983 for conduct prescribed by facially valid court orders).

Defendant, a sergeant at Clark County Parole and Probation, is immune from liability for carrying out the parole board's facially valid order regarding Plaintiff's release. The Court finds that, since Defendant enjoys absolute immunity regarding his actions in relation to the parole board, further amendment of the complaint could not cure its deficiencies.

Accordingly, it is **RECOMMENDED** that Plaintiff's amended complaint be **DISMISSED** with prejudice.

Dated: June 14, 2016



NANCY J. KOPPE
UNITED STATES MAGISTRATE JUDGE

NOTICE

Pursuant to Local Rule IB 3-2, any objection to this Report and Recommendation must be in writing and filed with the Clerk of the Court within fourteen (14) days. The Supreme Court has held that the courts of appeal may determine that an appeal has been waived due to the failure to file objections within the specified time. *Thomas v. Arn*, 474 U.S. 140, 142 (1985). This circuit has also held that (1) failure to file objections within the specified time and (2) failure to properly address and brief the objectionable issues waives the right to appeal the District Court's order and/or appeal factual issues from the order of the District Court. *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir. 1991); *Britt v. Simi Valley United Sch. Dist.*, 708 F.2d 452, 454 (9th Cir. 1983).